

No. 47283-0-II

COURT OF APPEALS, DIVISION II,  
IN THE STATE OF WASHINGTON

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In the Matter of the Guardianship of:

CHRISTOPHER JUNK,

An Incapacitated Person,

and

RBC TRUST COMPANY (DELAWARE) LIMITED,

Appellant.

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BRIEF OF APPELLANT RBC TRUST COMPANY  
(DELAWARE) LIMITED

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## A. INTRODUCTION

The issue presented by this case is the reasonableness of the collective fee charged by RBC Trust Company (Delaware) Limited ("RBC") as the trustee and the fee charged by UBS Financial Services ("UBS"), the trust's investment services manager appointed by RBC, to a large special needs trust, the Christopher Nicholas Junk Special Needs Trust Two ("Junk Trust").

After many years of approving RBC's trustee reports and the attendant fees for handling the Junk Trust, the trial court *sua sponte* appointed a guardian ad litem ("GAL") for the Trust beneficiary. That GAL then criticized RBC's fee structure, despite his observation that the Trust was operating smoothly. The GAL also ignored the substantial earnings and overall growth experience of the Trust's investments during the reporting period. The trial court retroactively reduced the trustee fees without specifically recounting on the record its reasons for doing so consistent with the Trust instrument or statutes and case law pertaining to trustee fees.

This Court should reaffirm existing law on trustee fees, reverse the trial court's order reducing RBC's trustee fees, and direct the trial court to reinstate the prior trustee and investment manager fee structure that is reasonable and has served the Junk Trust well.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in admitting the GAL report into evidence and treating its determinations on the reasonableness of trustee fees as conclusive.

2. The trial court erred in entering its February 6, 2015 order approving the trustee's report when it retroactively restricted trustee fees and further restricted them for the future.

(2) Issues Pertaining to Assignment of Error

1. Where a GAL lacks experience in trust accounting or administration, conducts a limited investigation of a trustee's and investment manager's fees, ignores the trust instrument's direction on such fees, and fails to address the appropriate grounds for assessing the reasonableness of fees, did the trial court abuse its discretion in admitting the report into evidence and treating it as a conclusive basis upon which to reduce fees charged by a trustee to the trust? (Assignment of Error Number 1)

2. Did the trial court err in concluding that a trustee's and investment manager's fees were excessive retroactively, contrary to its own previous order, and setting a new fee structure for such fees prospectively where the trial court relied on improper expert testimony, ignored the trust instrument, and failed to assess all of the grounds for calculating reasonable fees for such services under the trust instrument and Washington law generally? (Assignment of Error Number 2)

C. STATEMENT OF THE CASE

Christopher Junk, then age eight, fell from a tree in October 1998, suffering catastrophic injuries. CP 2. He lost a leg, suffered head injuries that affected his thought processes and his vision, and experienced a seizure disorder; he also had a stroke affecting the use of his left hand. *Id.*

A guardianship was sought for Christopher in 1999 while he was a minor, (King County Cause No. 99-4-02005-4 KNT); his father Dennis was appointed his guardian in 2001. CP 4. The Junk Trust, a special needs trust was established for Christopher in 1998 pursuant to SPR 98.16W and 42 U.S.C. § 1396p(d)(4)(A) and funded from the proceeds of a settlement in a personal injuries action arising out of his fall. CP 3, 11-24. The trust instrument specifically addressed trustee fees and conferred authority upon the trustee to retain investment advisors. Paragraph 4.3(f) of the instrument provided that the trustee would "receive compensation for services as Trustee, in accordance with the Trustee's schedule of fees, applying to trust accounts of this kind at the time such services are rendered." CP 21. A court would approve all fees paid to the trustee at each accounting review. *Id.* Paragraph 4.3(c) authorized the trustee to employ without any restriction investment advisors "as in the Trustee's judgment are reasonably necessary for the management and protection of the trust..." CP 9. Such an investment advisor would be paid by the trustee from trust proceeds "in such proportions as the Trustee shall



determine to be proper." *Id.*<sup>1</sup> The principal of the trust in May 2008 exceeded \$3.7 million. CP 3. The initial trustee of the Junk Trust was Guardianship Services of Seattle. The Advisory Trust Company of Delaware ("ATCO") succeeded it as trustee in July 2007. *Id.* RBC was approved by the trial court as the trustee in October 2009. CP 111-12.

When Christopher reached the age of majority, a new guardianship was sought in the Pierce County Superior Court in Cause No. 08-4-00830-7. CP 1-24. A GAL was appointed for Christopher on May 20, 2008. CP 25-29. A personal care plan was also established for Christopher pursuant to which he resided with his father, who served as his guardian, and his step-mother. CP 38-39. The guardianship order was entered on July 17, 2008 with a direction that the trustee of the Junk Trust transfer venue over the trust to the Pierce County Superior Court. CP 60-70, 72.<sup>2</sup>

Thereafter, the Pierce County Superior Court routinely approved the guardian's annual report and the trustee's report for the Junk Trust, approving RBC's and UBS's fees. *E.g.*, CP 73-76 (2008-09); CP 110-13 (2008-09); CP 215-17 (2009-10); CP 248-52 (2010-11).

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<sup>1</sup> This paragraph of the trust instrument supports the concept of having a separate trustee and investment advisor, rather than unifying both functions in a single entity.

<sup>2</sup> That change of venue occurred in December 2008, and the Pierce County Superior Court consolidated proceedings relating to the Junk Trust and Christopher's guardianship. CP 78. The trial court specifically approved the guardian's report, CP 253-66, and extended the guardianship indefinitely in October 2012. CP 267-70.

In October 2009, when RBC became the successor trustee to ATCO, the trial court specifically approved RBC's fee schedule which was as follows:

As Trustee, RBC intends to charge an annual fee of 0.65% on the first \$500,000.00, 0.55% on the next \$500,000.00, 0.40% on the next \$4,000,000.00 and 0.30% on the balance over \$5,000,000.00. Additional fees may be charged for services which are not covered by the annual fee.

CP 84-85. *See generally*, CP 111-12. It also approved UBS's discounted investment management fee which was as follows:

UBS will continue to charge a discounted annual fee on the managed accounts of 2.25% on the first \$500,000.00, 1.9% on the next \$500,000.00, 1.6% on the next \$4,000,000.00 and 1.4% on the balance over \$5,000,000.00.

CP 85, 111-12.

The trial court's change of heart regarding RBC's fees began in 2013.<sup>3</sup> In early January 2013, RBC filed its trustee report and petition for approval for the period of October 2011 - September 2012. CP 271-544. The court entered an order approving the report on January 25, 2013 which partially approved RBC's fees in the amount of \$5,000, but allowed for further review of the remaining unapproved fees. CP 545-49. In December 2013, RBC filed a petition for approval of its October 2011 - September 2012 fees, seeking approval of the fees in excess of the \$5,000,

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<sup>3</sup> Prior to this date, the proceedings were conducted before the Honorable Gary Steiner. Subsequently, the trust was re-assigned to the Honorable Gerold E. Johnson.

with supplemental information and legal authority to support its position. CP 550-614. RBC also filed its report and petition for approval for the reporting period of October 2012 - June 2013, which included a request for approval of its fees. CP 615-872.

By a December 13, 2013 order, the trial court approved RBC's fees in excess of \$5,000 for October 2011 - September 2012 and authorized RBC to receive compensation according to its fee schedule "unless and until otherwise directed by the Court." CP 873-74.<sup>4</sup> By a separate order, the court also approved RBC's report for October 2012 - June 2013. CP 875-79.

In October 2014, RBC filed its report and petition for approval for July 2013 - June 2014, which included a request for approval of its fees. CP 880-1092. On November 21, 2014, the trial court *sua sponte* appointed Dan Albertson as GAL to review RBC's trustee report, including specific review of attorney fees and costs<sup>5</sup> and trustee fees and

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<sup>4</sup> The order stated:

RBC Trust Company (Delaware) Limited is authorized to receive compensation at an annual fee of 0.65% on the first \$500,000 in Trust assets, 0.55% on the next \$500,000 in Trust assets, 0.40% on the next \$4,000,000 in Trust assets, and 0.30% on all Trust assets in excess of \$5,000,000, in accordance with its fee schedule, unless and until otherwise directed by the Court.

CP 874.

<sup>5</sup> This appeal only involves the issues pertaining to trustee fees.

costs. CP 1104.<sup>6</sup> The trial court was seemingly prompted to do so by its flawed perception that the Trust was "running out of assets." RP (2/6/15):2, 21.<sup>7</sup> The court expressed speculative fears about what might happen at a later date to Christopher once his father passed away. *Id.* at 3, 21. The trial court also had a preconceived notion that trustee fees for the Trust were "extraordinary." *Id.* at 3.

Albertson filed his GAL report on January 16, 2015. CP 1105-17.<sup>8</sup> That report specifically compared the combined RBC/UBS fee with that of other institutional trustees. CP 1105-10. Apart from his criticism of the trustee fees and hours spent by RBC on the trust, CP 1111, Albertson made the contradictory observation<sup>9</sup> that "this appears to be a fairly smooth functioning trust," *id.*, and concluded that the trust's expenditures for Christopher, including fees paid to his father Dennis as his guardian/caregiver, were "entirely appropriate." CP 1113. *See also*, CP

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<sup>6</sup> Although Albertson's appointment as the GAL is referenced in a trial court minute entry, the order appointing him is not specifically referenced on the trial court's docket. A copy of the appointment order is provided in the Appendix to this brief.

<sup>7</sup> The trial court's perception about the Trust's assets was wildly inaccurate as the Trust res has *grown* in recent years. (\$2.969 million in 2009 to \$3.16 million in 2014). CP 80, 84, 883-84, 896.

<sup>8</sup> Albertson's report was based on a single 90-minute interview of Christopher and Dennis, and 12 hours of analysis. CP 1113, 1117; RP (2/6/15):6.

<sup>9</sup> Albertson apparently did not appreciate that RBC's hours as trustee accomplished the result of a "smooth functioning trust."

1115 ("Based upon the documents I examined, the expenses listed in the annual accounting reflect the actual expenses incurred and, apart from any issue regarding fee, appear to be appropriate."). RBC submitted an extensive response to that report, critical of its analysis. CP 1154-87.

On February 6, 2015, the trial court entered an order approving RBC's report for the 2013-14 period, but retroactively reduced RBC's trustee fees,<sup>10</sup> and imposed limitations on its future trustee fees. CP 1209-13. *See* Appendix. RBC timely appealed that order to this Court. CP 1219-25.

#### D. SUMMARY OF ARGUMENT

The trial court erred in reducing the trustee fee charged by RBC to the Junk Trust both retroactively and prospectively. The fees were consistent with the schedule of fees in the trust agreement; that schedule controls. Further, the trial court's fee cap affected UBS's fee. In accordance with the Trust's instrument, RBC appropriately exercised its discretion to retain UBS as a separate investment manager. In any event,

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<sup>10</sup> The trial court's retroactive limitation on RBC's was essentially a direction to disgorge fees it had already earned. As its 2013-14 report filed on October 29, 2014 demonstrated, RBC scrupulously complied with the trial court's December 13, 2013 order that allowed it to charge fees in accordance with that order "unless and until otherwise directed by the Court." CP 874. RBC did not change its fee schedule, nor did the trial court direct that RBC was no longer authorized to be compensated pursuant to its fee schedule. RBC reasonably relied on the December 13, 2013 order to collect its fee during the 2013-14 reporting period.

the fees charged to the Trust were also consistent with the Supreme Court's *Powell* factors for determining the reasonableness of such fees.

In reducing the trustee fees, the trial court relied improperly upon a report from a GAL it appointed. That GAL had no proven expertise in trust fees or administration and his report focused solely on only one of the *Powell* factors.

On this record, RBC's trustee fee and UBS's investment manager fee were proper given the trust instrument and were reasonable in light of the *Powell* factors. The trial court's February 6, 2015 order to the extent it is contrary should be vacated.

E. ARGUMENT<sup>11</sup>

(1) Washington Law on Compensation of Trustees

Trusts in Washington are governed by Title 11 RCW Chapters 96A through 118. These statutes provide several default rules which apply to such trusts. RCW 11.98.070(26) authorizes a trustee to receive fees for its services, described as follows:

reasonable compensation to the trustee or co-trustees  
considering all circumstances including the time, effort,

<sup>11</sup> No Washington case has specifically articulated the standard of review regarding a trial court's decision on the reasonableness of a trustee's fees. Such a decision would seem to fall within a trial court's discretion but where, as here, the trial court failed to document its decision in light of the trust instrument and controlling Washington law, the *Powell* factors, this Court should review the issue de novo because the core question involves the application of legal principles to the facts in the case. *Wash. Imaging Services, LLC v. Wash. State, Dep't of Revenue*, 171 Wn.2d 548, 555, 252 P.3d 885 (2011).

skill, and responsibility involved in the performance of services by the trustee and reimburse the trustee, with interest as appropriate, for expenses that were properly incurred in the administration of the trust.

In the absence of any specific language in a trust regarding fees, the default language of RCW 11.98.070(26) controls how a trustee is compensated. However, with limited exceptions, the language of a trust agreement may:

relieve the trustee from any or all of the duties, restrictions, and liabilities which would otherwise be imposed by chapters 11.95, 11.98, 11.100, and 11.104A RCW and RCW 11.106.020, or may alter or deny any or all of the privileges and powers conferred by those provisions; or may add duties, restrictions, liabilities, privileges, or powers to those imposed or granted by those provisions...

RCW 11.97.010. *Vaughn v. Montague*, 924 F. Supp.2d 1256, 1264 (W.D. Wash. 2013) (trustee's powers derive from trust instrument and that document controls even if its terms conflict with statutory obligations). Accordingly, the power and authority to compensate a trustee under RCW 11.98.070(26) can be altered by the language of a trust agreement. That occurred here.

The Junk Trust's own instrument approved language deviating from RCW 11.98.070(26). Paragraph 4.3(f) of the Junk Trust instrument states that the trustee is authorized "[t]o receive compensation for services as Trustee, *in accordance with the Trustee's schedule of fees*, applying to

trust accounts of this kind at the time such services are rendered...At each accounting review the court shall review and approve all fees paid to any professional Trustee." CP 21 (emphasis added). This paragraph controls the determination of RBC's compensation.

Similarly, paragraph 4.3(c) of the Trust instrument authorized RBC to employ a separate investment manager like UBS. CP 9. RBC appropriately exercised its discretion given to it by the trust instrument to continue to employ UBS, a capable and respected firm, as the investment manager and to pay it according to its fee schedule.

As noted *supra*, in advance of RBC's appointment, ATCO filed a report on October 15, 2009, which disclosed the fees RBC and UBS intended to charge as trustee and investment manager respectively and included copies of their fee schedules. CP 84-85. This report gave notice of RBC's and UBS's method of compensation to the court and all interested parties. No one objected to this fee schedule, and the trial court approved those fee schedules, which have remained unchanged. CP 111-12.

Further, on December 13, 2013, the trial court specifically authorized RBC to receive compensation in accordance with its fee schedule "unless and until otherwise directed by the Court." CP 874. It is



undisputed that RBC's fees during the reporting period prior to the trial court's February 6, 2015 order were in accordance with that fee schedule.

Additionally, in a case in which the decedent established a testamentary trust and provided that the trustee should "receive a just compensation for his services," our Supreme Court adopted criteria established by the Arizona Supreme Court<sup>12</sup> that have long governed the evaluation of the reasonableness of an individual trustee's fees: "(1) [t]he amount of risk and responsibility involved, (2) the time actually required of the trustee in the performance of the trust, (3) the size of the estate, (4) the amount of income received, and (5) the manual and over-all services performed." *In re Trust Estate of Powell*, 68 Wn.2d 38, 41, 411 P.2d 162 (1966). The Court also addressed the difference in fees between individual and corporate trustees. *Id.* at 43.

The *Powell* factors have been approved subsequently as the prevailing standard. In *Fred Hutchinson Cancer Research Center v. Holman*, 107 Wn.2d 693, 709, 732 P.2d 974 (1987), the Supreme Court held that an individual trustee's fee was excessive, when compared to that of a corporate trustee, applying the *Powell* factors. The testator's will created a testamentary trust providing the trustees should be paid their

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<sup>12</sup> *In re Estate of Dunlap*, 2 P.2d 1045 (Ariz. 1931). See generally, *Restatement (Second) of Trusts* § 242.

“normal compensation.” The Supreme Court ultimately concluded that the testator “did not intend to pay abnormally high compensation even if the trustee took such compensation in good faith.” *Id.* at 701.<sup>13</sup>

Thus, the *Powell* factors give content to the statutory authority of a trustee to receive “reasonable compensation.” Here, in accordance with RCW 11.97.010, the trust instrument established that the trustee was to receive compensation in accordance with its fee schedule. This Court may also analyze that fee schedule for its reasonableness under the *Powell* factors.

(2) The GAL Report Should Not Have Been Treated As Conclusive by the Trial Court

<sup>13</sup> Not only is *Powell* the current law in our state on trustee fees, it is in line with other jurisdictions which account for various factors in determining the reasonableness of a trustee’s compensation. Other states take various approaches to a trustee’s compensation. According to *Scott and Ascher on Trusts*, “the general principle is that a trustee is entitled to reasonable compensation. There is, however, little uniformity among the states as to how to determine what is reasonable.” 4 Austin W. Scott et al., *Scott and Ascher on Trusts*, §21.1 (5th ed. 2007). Some states use statutorily determined percentages. *Id.* However, “[i]n an increasing number of states the rule is, simply, that the trustee is entitled to reasonable compensation.” *Id.*

In reviewing a trustee’s compensation, courts will consider a variety of factors, including the value and character of the trust property; the risks and responsibilities undertaken, the time spent, and the quality and character of the services provided by the trustee; the character and cost of services provided by others; whether the trust was easy or difficult to administer; the trustee’s skill, experience, and facilities; the results obtained; and how well the trust was administered.

*Id.* Although *Powell* dates back to 1966 and was most recently reaffirmed in 1987, many, if not all, of the factors outlined by *Scott and Ascher on Trusts* are accounted for in five factors provided for in *Powell*.

Before addressing the reasonableness of RBC's fees generally, it is necessary to specifically address the GAL report. The trial court effectively treated the GAL report as conclusive here in reducing RBC's trustee fees, but it should not have done so. The GAL is merely a witness, not tantamount to a special master. The GAL lacked the expertise to evaluate RBC's trustee fees, did not conduct a complete investigation of such fees, did not address the history of the Junk Trust on trustee fees, and did not assess all of the *Powell* factors, as Washington law requires.

While trust statutes provide for the appointment of GALs for trust beneficiaries (*see* Appendix),<sup>14</sup> very little legal authority exists on a GAL's precise role in such court proceedings. Specifically, no case law exists on whether such a GAL is an expert subject to ER 702.<sup>15</sup>

In other settings, Washington courts have addressed a GAL's role. For example, in family law matters involving parenting issues, RCW 26.09.220 and RCW 26.12.175 authorize the appointment of a GAL to advise the court or to represent a minor child. Such a GAL "acts as a

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<sup>14</sup> See RCW 11.96A.160(1); RCW 11.106.060. The appointment of a GAL for the beneficiary of a special needs trust is discretionary with the trial court. *Anderson v. Dussault*, 181 Wn.2d 360, 368, 333 P.3d 395 (2014).

<sup>15</sup> ER 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

neutral advisor to the court and, in this sense, is an expert in the status and dynamics of that family who can offer a commonsense impression to the court." *Fernando v. Nieswandt*, 87 Wn. App. 103, 107, 940 P.2d 1380, review denied, 133 Wn.2d 1014 (1997). Division I, however, also made clear that such an "expert" need not formally qualify as such under ER 702 for the court to credit the GAL's special "expertise." *Id.* The particular GAL in *Fernando* did not have specialized training in child parenting matters, but, nonetheless qualified to serve. Ultimately, Division I concluded that a court was free to ignore such a GAL's recommendations if not supported by the evidence or if other testimony is more persuasive. Division I found no abuse by the trial court in crediting the GAL's testimony over three more traditional experts. *Id.* at 107-08.

In the guardianship setting, RCW 11.88.090 authorizes the appointment of a GAL to represent an incapacitated person. The statute prescribes the necessary qualifications for such a GAL and the GAL's duties including the report to be prepared by the GAL. In a case relating to whether a GAL should be appointed for the alleged incapacitated person, the court stated a "guardianship GAL is not a traditional expert but becomes an expert on the status of the alleged incapacitated person and the dynamics of his circumstances in order to offer an independent and commonsense perspective to the court." *In re Guardianship of Stamm*,

121 Wn. App. 830, 837, 91 P.3d 126 (2004).<sup>16</sup> In *Stamm*, the GAL testified before a jury on whether a guardianship should be instituted. While Division I indicated a GAL "becomes an expert on the status of the alleged incapacitated person and the dynamics of his circumstances in order to offer an independent and common sense perspective to the court," *id.* at 837, the GAL must still "qualify by training and experience before being appointed." *Id.* Moreover, the GAL's observations on credibility are *irrelevant*. *Id.* at 838. Division I concluded that it was reversible error for a GAL to assert to the jury that she was the eyes and ears of the court as to the credibility of the people whom she encountered. Division I specifically noted that a jury must be advised that "it is not bound by the GAL's opinions, and know that it may ignore those opinions if they are not supported by other evidence or are otherwise unconvincing." *Id.* at 839-40.

There is limited case law on the authority of a GAL appointed under RCW 11.96A.160 or RCW 11.106.060. In *In re Guardianship of Matthews*, 156 Wn. App. 201, 210, 232 P.3d 1140 (2010), a case involving TEDRA fees, this Court determined that a GAL appointed under

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<sup>16</sup> Such a GAL must have knowledge, training, and experience in the "areas relevant to the needs of incapacitated persons, legal procedure, and the requirements of [the statutes]." *Id.* at 836. RCW 11.96A.160 does not similarly provide such direction for a GAL in a trust matter.

RCW 11.96A.160 is an agent of the court and has a duty to protect the interests of an incapacitated person. Taking *Fernando* and *Stamm* as precedent, a GAL is not a formal expert who must meet the strict requirements of ER 702. But that is not to say that anybody can serve as a GAL in the trust setting. The GAL must qualify by training and experience to assist the court. Critically, the GAL's testimony to the court is not conclusive; the court must exercise independent judgment and it is free to disregard the GAL's testimony.

Here, the November 21, 2014 order that appointed Dan Albertson as the GAL directed him to review RBC's 2014 trustee report and to “specifically review and address the amount of attorney’s fees and costs, the amount of the trustee’s fees and costs, and the Trust expenditures...” See Appendix. The trial court wanted information from Albertson on these issues, but Albertson’s expert testimony was subject to the requirement that he must be qualified to provide meaningful testimony to the court on them.

Albertson did not have a demonstrable background and expertise in trust accountings, attorney fees and costs, trustee fees, investment management or fees associated with such work, or trust expenditures; he did not provide qualifications by *curriculum vitae* or other information to the trial court that established his predicate expert knowledge, skill,

experience, training or education qualified him to provide an opinion on trustee fees. The information Albertson provided to the trial court on trustee fees was flawed and incomplete, and should have been disregarded by the trial court.

(a) The GAL Lacked Expertise in Trust Administration and Trustee Fees

Albertson practices in the areas of personal injuries and employment law. CP 1119-28. He also serves as a settlement guardian ad litem (“SGAL”) pursuant to SPR 98.16W. However, the record contains no evidence that Albertson has any particular experience or expertise in dealing with trust administration or trustee or investment management fees. Albertson's qualification as a SGAL and experienced personal injuries and employment attorney did not necessarily qualify him to opine on issues related to trust administration or trustee or investment management fees. The trial court erred in treating his report as effectively conclusive.

(b) The GAL Did Not Conduct a Complete and Thorough Investigation

Compounding his lack of trust administration or trustee and investment management fee expertise, Albertson did not undertake a thorough investigation of the roles of RBC and UBS in the Junk Trust or in analyzing their respective fees. RBC's counsel communicated with

Albertson following his appointment as GAL and provided him copies of pertinent documents such as the 2014 trustee report, fee declarations in support of requests for attorney fees and costs, the proposed order approving the 2014 report, the petition for approval of trustee's fees, and the December 13, 2013 order approving trustee's fees. CP 1160. Counsel also offered Albertson his assistance and RBC's to help him complete his investigation. *Id.* Albertson had no communication with RBC or UBS. *Id.*<sup>17</sup> Albertson had limited communications with RBC's counsel. CP 1160-61.

As noted *supra*, in submitting his report, Albertson met for 90 minutes with Christopher and Dennis Junk, reviewed the pleadings provided by RBC's counsel, and provided a basic comparison of RBC's fees and the UBS's investment management fees with the fees charged by two other banks that also serve as trustees. CP 1105-07.

Certainly a necessary step in investigating the reasonableness of a request for trustee fees is to communicate with the individual/entity making the request regarding the justification for such fees. That did not happen here. Had Albertson done so, RBC would have provided him valuable information pertinent to a complete investigation. For example,

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<sup>17</sup> Had Albertson spoken with RBC, he would have learned that it serves as trustee for over 60 special and supplemental needs trusts; other trustees might lack such extensive experience.



he would have learned that RBC kept a log of the time spent on the Junk Trust during the 2013-14 reporting period, explaining the 252 hours of time RBC spent on trust administration about which Albertson criticized RBC in his report, CP 1111-12, despite noting the smooth functioning of the trust. He also would have received a thorough explanation of why a simple "apples-to-apples" comparison of the fees charged by RBC and UBS to other professional trustees is inadequate. Implicit in Albertson's GAL report is a criticism of having a separate trustee and investment manager. CP 1106-10. Such a separation of functions was authorized here by the Trust instrument, and consistent with sound practice. As will be noted *infra*, the separation of such functions is common in the industry and avoids the conflict of interest of a trustee investing in its own proprietary products to the exclusion of better investments. The arrangement also affords a trustee more options to better serve the trust with the appropriate expert.

Albertson's investigation of the issues raised by the trial court was ultimately not complete.

(c) The Basis for the GAL Report Was Flawed

Other than a facial comparison of the fees incurred with RBC and UBS and two other potential trustees, Albertson offered no justification of why a deviation from the Junk Trust language and prior court orders was

appropriate.<sup>18</sup> Albertson's sole contention was that the fees were "too much." RP (2/6/15):10.

Albertson placed a great deal of emphasis on the comparison of the fees charged by RBC and UBS with the fees charged by two banks who also serve as a trustee. CP 1106-11. When comparing the fees of other trustees, the *Powell* court determined that "*charges made by trust companies and trust departments of banks for similar services are not controlling...but they certainly are to be included in the factors going into a determination of what constitutes a just and reasonable fee.*" *Powell*, 68 Wn.2d at 41. Albertson's estimate of fees which would be charged by two other trustees to the Junk Trust can be given some weight in balancing the five *Powell* factors *infra*; but the mere comparison of those estimated fees to the fees incurred by RBC and UBS is not in and of itself *conclusive* evidence that RBC's or UBS's fees were unreasonable as Albertson appeared to conclude.

The majority of professional trustees are compensated for their services as trustee based on a percentage of the trust assets. CP 1163.<sup>19</sup> Some trustees who hire outside investment advisors bill hourly for their

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<sup>18</sup> Moreover, any such deviation from the fee schedule previously authorized by the trial court should not be applied retrospectively where RBC legitimately relied on the fee schedule in the December 13, 2013 order.

<sup>19</sup> RBC has cited to its response to the GAL report filed in the trial court for many of the factual statements in this brief. That response was verified. CP 1182.

trustee services, while others charge a percentage of the trust assets. Both practices are well-established in Washington and other states. *Id.* Corporate entities such as banks and trust companies are commonly compensated with a percentage fee. RBC, Wells Fargo Bank, U.S. Bank, Laird Norton Trust Company, Comerica Bank & Trust and Key Bank are but a few examples of corporate trustees that bill on a percentage. CP 1163.

Albertson's methodology for calculating the reasonableness of the fees here was nowhere articulated and was mathematically flawed:

- Albertson based his calculations on a trust balance of \$3,205,505.00. CP 1107. This figure did not appear to match any balance which was provided in the 2014 report or any other source. CP 1164;
- Albertson claimed to have used an “investment fee calculator” to determine the fees over 10, 20, 30, and 50 years. CP 1107. However, he provided no explanation of how the calculator works, how the calculation was made, or that he has the experience to make such a calculation;
- Albertson failed to account for the changing percentages the trustee may receive as the Junk Trust assets change in value. For example, RBC’s fees reduces to 0.30% on Trust balances over \$5,000,000, UBS’s fees decrease to 1.40% on balances over \$5,000,000 and Wells Fargo’s fees reduce to 0.85% on balances over \$5,000,000. The Junk Trust assets could conceivably increase to more than \$5,000,000 if its performance continues to exceed the expenditures. CP 1164;
- Albertson failed to account for the impact that the Junk Trust expenditures will have on the size of the Trust and

the percentage fees which will be charged over time.  
CP 1164;

- Albertson did not account for any changes RBC/UBS may make to the Trust investments over time. Specifically, Trust assets could be moved from managed accounts to non-managed accounts. UBS did not charge an investment management fee on Trust assets held outside of managed accounts, such as separate bonds or cash. However, UBS often shifted investments to account for changes in the market conditions and changes in the beneficiary's needs. Such shifts can have a significant impact on the overall trustee and investment management fees. CP 1164-65;
- Albertson assumed that RBC/UBS, Wells Fargo and Key Bank would all receive the exact same rate of return. This presumption would have a dramatic effect on the overall return to the Trust over 10, 20, 30 and 50 years, and exemplifies the inadequacy of a simple comparison of fees without accounting for the Trust's long-term investment performance net of all trustee and investment management fee. CP 1165.

These flaws underscore that estimating fees over time is a complex, not a simple, calculation, and that Albertson's report was too simplistic an exercise that ultimately did not aid the trial court's assessment of the trustee or investment management fees.

Equally important to the complexities of the calculations is Albertson's methodology of comparing *only openly disclosed* trustee and investment management fees of various trustees. Albertson reported that the fees being paid by Junk Trust “appear to be *much* higher than alternatives available through other institutions...” CP 1110-11 (emphasis

in original). However, appearances can be quite deceptive. By only looking at the openly disclosed fees, he failed to account for any *undisclosed fees* charged by other trust managers. This is important here because it constitutes a fundamental difference between managed accounts used by UBS and investments in mutual funds.

Ken Horwitz, a Senior Vice President at UBS and an investment advisor for the Junk Trust, testified to the flaws in such a comparison. CP 1129-34. For example:

- A potential for conflicts of interest, self-dealing, self-interested or directional choices exists when a trustee invests internally, that is, in its own investment products. Where the trustee and investment advisor are separate, either can be changed when it is underperforming, while the other is kept. This occurred *twice* with the Junk Trust as the trustee has been changed on two separate occasions, while the investment advisor has remained consistent. CP 1129-30;<sup>20</sup>
- RBC/UBS only use managed accounts which charge finite fees that are fully disclosed and reported to the court with annual accountings. By comparison, some trustees invest in mutual funds which charge “supplemental or pro-rated fees in addition to the disclosed sales charge after the end of the year.”<sup>21</sup> CP 1131;

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<sup>20</sup> UBS was the Trust's investment manager *before* RBC became its trustee.

<sup>21</sup> Michael Longyear, a GAL in a similar case, stated that with Wells Fargo Bank “separate commission-like charges are imposed for stock and bond purchases; and typical mutual fund fees are passed down for non-proprietary fund acquisitions.” CP 1151. As a result, “the internal fees, supplemental fees, sales charges and pro-rated fees within mutual funds or co-mingled trust funds which are incurred by many other professional trustees are not revealed on the accountings filed with the Court.” Longyear, a Seattle attorney with experience in trust administration, was appointed as a GAL in a similar matter in 2005 and prepared a report which compares the fees charged by several

- Managed account fees are typically 40% less than internal management fees with mutual funds. By using managed accounts “the annual net return of the Junk Trust is higher from a lower aggregate overhead of trustee and investment management fees.” CP 1132;
- Undisclosed fees can only be identified in a court accounting “by the reduced rate of return after the payment of fees.” CP 1131.

Horwitz’s observations demonstrate that Albertson’s simplistic comparison of fee percentages fails to take the undisclosed fees charged by some trustees into account. At the very least, Albertson’s analysis should have attempted to include a review of the comparative rates of return achieved by the various trustees. In the end, the fully disclosed fees charged by RBC for trust administration and UBS for investment management were roughly the same as their competitors and have previously been found to be “commercially reasonable.” CP 1152. RBC and UBS should not have been punished by the GAL and the trial court for

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Washington trustees that has been found particularly informative by judges and court commissioners in King and Pierce counties. CP 1133, 1142-53. Longyear noted the number of trustees charging a percentage fee as well as the similarities between the arrangement with UBS Financial Services and American Guaranty and Trust Company and other trustees. CP 1145-46, 1167-68. RBC’s fees were well within range of the fees charged by many of its competitors, even when considering the investment management fees charged by UBS.

Albertson addressed the Longyear report in making his oral presentation to the trial court, contending that Longyear’s conclusion that UBS’s fee structure was reasonable was not supported as to the Trust. RP (2/6/15):5-7. But the grounds for distinguishing Longyear’s analysis, such as visiting Christopher, are simply not a tenable basis upon which to distinguish Longyear’s analysis of fees charged by various trustees.

fully disclosing their fees rather than trying to hide them.

Finally, Albertson's comparison of fees charged by various trustees fails to account for the scope and quality of services to be provided by a trustee. A trustee providing a more intense level of services may charge a higher fee for that level of services. Albertson's comparison nowhere accounted for the differences in the trustee's intensity of services.

In sum, the GAL report here was flawed and should not have been treated by the trial court as conclusive on the reasonableness of the trustee fees in entering its February 6, 2015 order.

(3) The RBC/UBS Fees Here Were Appropriate under the Trust Instrument and Were, In Any Event, Reasonable

Most critically here, this Court has no basis from the trial court's February 6, 2015 order or its oral ruling on trustee fees, RP (2/6/15):24-25, upon which to base its review of the trial court's decision on trustee fees. In stark contrast to the trial court in *Holman*, the trial court here did not enter findings of fact or conclusions of law on the reasonableness of RBC's fees. Instead, it merely adopted the GAL report, limited as it was to essentially only one *Powell* factor, as the basis for its decision. CP 1212; RP (2/6/15):24-25. In doing so, it erred.

First, the trial court failed to indicate why it could choose to depart at all from the specific direction in the Junk Trust instrument at paragraphs

4.3(c) and 4.3(f) that the trustee's fee would be "in accordance with the Trustee's schedule of fees. . .", CP 21, and the investment advisor's fees would be within the trustee's discretion. CP 9. As noted *supra*, the trial court previously approved the RBC/UBS fee schedule. Such a specific direction in the trust instrument controls over any conflicting statutory obligations. *Vaughn, supra*.

Even if the trustee and investment management fees are analyzed for their reasonableness against the *Powell* factors, the RBC/UBS fees were reasonable. Even in the absence of findings or conclusions, this Court can review the record here disclosing that the trial court merely adopted the GAL report *en toto*, and determine that the trial court's February 6, 2015 order was error, particularly where the trust instrument controls. Despite not obtaining RBC's time log for work on the Junk Trust, Albertson's GAL report criticized RBC's time spent on the Trust both in the past and in the 2013-14 period. Time is but one of the five *Powell* factors. Albertson failed to address any of the other four factors in reviewing RBC's fees. Once *all five Powell* factors are analyzed, RBC's compensation as trustee was reasonable. Some of the factors were particularly critical when trying to compare RBC's fees to the fees charged by other professional trustees.

(a) The Amount of Risk and Responsibility Involved



The first factor in analyzing a trustee's compensation is the "amount of risk and responsibility involved" in administering the Trust. *Powell*, 68 Wn.2d at 41; *Fred Hutchinson*, 107 Wn.2d at 700. Albertson provided no insight on how this factor plays into RBC's compensation. RBC is the sole trustee of the Junk Trust and takes on *all* the risks and responsibilities associated with serving as trustee of that trust.

RBC's fee reflects the risk, responsibility and potential liability involved with serving in that capacity. The risks, responsibilities, and liabilities undertaken by RBC as trustee of the Junk Trust during the reporting period consisted of 1) undertaking all fiduciary duties, 2) financial management of the Trust assets, including asset allocation and directing the investment advisors, 3) making discretionary distributions, 4) managing the trust records, 5) obtaining and relying on the advice of professionals such as investment advisors, accountants and attorneys, 6) preparing annual accountings, 7) preparing and filing tax returns, and 8) general administration of the Trust. CP 14-16, 18-21 (paragraphs 2.1, 4.1, and 4.3).

Ultimately, RBC undertakes all the risk and potential liability which may occur.<sup>22</sup> RBC's risk not only includes potential liability due to

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<sup>22</sup> While RBC employs UBS as the Trust's financial advisor, RBC is liable for all of the risk and potential liability for serving as trustee. See RCW 11.97.070(27)(b) ("[t]his power to employ and delegate duties does not relieve the trustee of liability for

a legitimate breach of trust, but the possibilities that it must defend itself against an unwarranted lawsuit from a beneficiary even if its actions as trustee were appropriate. *See, e.g., Anderson, supra.* Although not a direct service provided to a beneficiary for which billable time can be associated, the risk and responsibility in serving as trustee are factors that every trustee must consider when determining their fee. RBC's trustee fees account for these risks and responsibilities.

In addressing the risk, RBC paid for substantial, general insurance for the Junk Trust, providing protection to trusts and beneficiaries in the event of a breach. RBC carried considerable professional liability insurance (up to \$100,000,000.00 per claim), which includes a financial institutional bond required by RCW 30.12.030 and coverage for directors and officers liability, errors and omissions, and general liability and property insurance. CP 1170. This coverage was at no additional cost to the Trust, although it provided an additional benefit to the Trust and the beneficiary in the event of any breach. *Id.*<sup>23</sup>

RBC also undertook other specific risks associated with the Junk Trust being supervised by the court. Court supervision requires the

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such person's discretionary acts, that, if done by the trustee, would result in liability to the trustee.").

<sup>23</sup> UBS carries its own insurance and bonding which provides an additional layer of potential liability protection to the Junk Trust for the investment activities undertaken by the financial advisors at UBS. CP 1170.

additional responsibility of preparing annual accountings for court analysis and approval. Additionally, as proven by these proceedings, one of the main risks associated with a court-supervised trust is that RBC is subject to the court's scrutiny and must justify its actions to a court. Such oversight created additional risk and responsibility for RBC.

As a special needs trust, the Junk Trust has additional risk and responsibility as the Trust proceeds must only be used for the beneficiary's extra and supplemental care above and beyond his means-tested public benefits, including Supplemental Security Income ("SSI") and Medicaid.<sup>24</sup> RBC cannot simply write a monthly check to Christopher Junk and be done with its duties. Instead, RBC must carefully consider its actions to ensure they comply with the specific rules associated with special needs trusts and coordination with SSI and Medicaid. These rules are complex and constantly changing. CP 1171.<sup>25</sup> RBC must also understand the difference between a multitude of public benefit programs, including SSI, Social Security Disability Insurance ("SSDI"), the various Medicaid programs and Medicare. *Id.* These programs have differing eligibility criteria, and expenditures from the Trust can have various

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<sup>24</sup> These benefits further undercut the trial court's apparent fear that Christopher could be left destitute at some unspecified future date.

<sup>25</sup> For example, the Social Security Program Operations Manual System ("POMS"), the internal policies which Social Security applies in reviewing trusts and the actions of trustees, have changed multiple times in the past three years. CP 1171. RBC must be familiar with these changes and adjust its actions accordingly.

impacts on each benefit. RBC must understand those differences to ensure its actions comply with the particular benefits available to Christopher. *Id.* This applies whenever the trustee receives a request for a distribution, pays bills on behalf of the beneficiary or drafts the annual Trust budget. *Id.*

If an action by RBC causes Christopher to lose eligibility for such benefits, RBC is at risk of being held liable to cover the lost benefits. That risk is extremely high if Medicaid is lost, where Christopher currently receives extensive assistance from Medicaid. *Id.* RBC undertakes the risk and responsibilities associated with coordinating discretionary distributions with Christopher's means-tested public benefits.

Special needs trusts such as the Junk Trust also expose RBC to additional risk and responsibilities due to the inherent challenges in dealing with individuals with disabilities. Individuals with compromised cognition such as Christopher may be more likely to misunderstand the trustee's duties and responsibilities and bring unsubstantiated actions against a trustee. Beneficiaries of special needs trusts require more of a time commitment than beneficiaries of other trusts; Christopher's needs are more complex than those of other beneficiaries. Christopher and Dennis Junk frequently required more explanation due to Christopher's cognitive limitations and their lack of familiarity with investments and

sophisticated financial structures like this special needs trust. CP 1172.

Assisting a guardian and caregiver also adds an extra layer of complexity to a trustee's responsibilities. RBC maintained a consistent working relationship with Dennis Junk. In fact, RBC had regular contact with him, directly or indirectly, in order to assist with distribution requests associated with Christopher's direct care. *Id.* Additionally, RBC coordinated Dennis' salary and benefits as well as any respite care hours Christopher required on an annual basis.<sup>26</sup>

The numerous risks and responsibilities RBC undertakes in serving as trustee of the Junk Trust are significant. They should factor heavily into the determination of RBC's compensation. RBC has accounted for this risk and responsibility in setting its annual fee. Albertson's report and the trial court's February 6, 2015 order ignored this.

(b) The Time Actually Required of the Trustee in the Performance of the Trust

*Powell* directed courts to consider "the time actually required of the Trustee in the performance of the trust." 68 Wn.2d at 41. Although Albertson never actually communicated with RBC regarding the time it spent on this matter, his report placed the greatest weight on this factor over the other four factors. Without any real basis, Albertson questioned

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<sup>26</sup> For example, whenever Dennis Junk was on vacation, Christopher required alternative care, including the services of a respite care employee. CP 1172.

the RBC's prior estimate of spending an average of 252 hours annually in administering the Junk Trust. If Albertson contacted RBC or its counsel, he would have discovered that RBC actually kept time records for the Junk Trust during the 2013-14 reporting period. CP 1185-87. Although RBC billed on a percentage fee basis as previously disclosed to and approved by the trial court, it began maintaining these records after the court initially raised concerns with its fees in 2013. CP 1173.

RBC had 189.75 hours of time spent on the Junk Trust in the 2013-14 reporting period. CP 1185-87.<sup>27</sup> RBC's time included review and payment of monthly bills, monthly reconciliation of transactions to UBS statements, annual trust budgeting, preparation of materials for the annual accounting, correspondence with counsel regarding the annual accounting, monthly review of investments, review and payment of taxes, correspondence with UBS, Christopher, and Dennis. *Id.* The hours did not include many internal administrative functions such as maintaining and organizing Trust records. However, the time accounted for which was spent by RBC managing the Junk Trust is considerable and weighs in favor of the appropriateness of RBC's fees as trustee.

Albertson reported that after meeting with Christopher and Dennis,

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<sup>27</sup> Based on the trustee fees of \$15,571.45, RBC would have averaged compensation of \$82.06 per hour if it billed on an hourly basis. CP 1173.

the trust was a “fairly smooth functioning trust.” CP 1111. However, the reason it appears this way to Christopher and Dennis is that RBC is doing a huge amount of work behind the scenes to ensure that the Trust is smoothly functioning.<sup>28</sup> The trial court’s decision did not address this point adequately.

(c) The Size of the Estate

*Powell* also directs a court to consider the “size of the estate” in evaluating trustee fees. 68 Wn.2d at 41. By their very nature, percentage-based fees reflect the size of the trust estate. Although the fee grows as the trust grows, the actual percentage *decreases* as the size of the trust increases. Regardless, trustees such as RBC who charge on a percentage fee basis have an inherent incentive to grow the trust investments as the amount of their compensation increases with the size of the trust. However, the size of the trust also increases a trustee’s responsibility and exposure to liability.

In addition, a trustee must still perform the same duties, regardless of the market conditions. As a result, if the trust assets decrease

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<sup>28</sup> The amount of time that RBC spends on the Junk Trust can vary dramatically from year-to-year. In some years the Trustee does much more work than in other years. For example, in prior reporting periods the Trust assisted in installing a pool and pool house at the Junk family home for Christopher’s use. That was a complex project and transaction which required a significant amount of time by RBC staff. CP 1174. However, the Trustee did not seek to increase its fee because it spent additional time on that matter. The variability in the time spent on the Trust is an inherent risk the Trustee takes in charging a percentage fee.

significantly in value due to reductions in the market, the trustee's fees will also be reduced. However, the trustee is still expected to do the same amount of work. In fact, the trustee may be required to do more work to adjust to the market and to ease the anxiety of concerned beneficiaries.

Regardless, the fees charged by RBC were more than proportionate to the size of the Junk Trust. The average of the beginning balance (\$3,192,427.55) and the ending balance (\$3,619,952.37) from the 2013-14 reporting period was \$3,406,189.96. RBC's fees of \$15,571.45 represented only 0.46% of the ending balance of the Junk Trust for the reporting period of July 1, 2013, through June 30, 2014. Even with UBS's investment management fee, the overall fees charged to the Trust were proportionate to its size. CP 1106-07, 1175.<sup>29</sup> The trial court did not address this factor.

(d) The Amount of Income Received

*Powell* also directed a court to consider the "amount of income received" by the Trust in analyzing trustee fees. 68 Wn.2d at 41. In other words, a court must look at the overall performance of the trust. *Fred Hutchinson*, 107 Wn.2d at 701.

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<sup>29</sup> Because Albertson compared the fees charged by other professional trustees, RBC noted below that based on the fee schedules cited in the GAL report, the *disclosed* trustee fee charged by Wells Fargo Bank would have been \$44,764.99, while Key Bank's trustee fee would have been \$43,655.71. CP 1175.



Critically, during the reporting period, at issue here, the Junk Trust received \$80,242.41 in interest and dividends and \$149,693.84 in realized gains. The total income and realized gains received by the Junk Trust was \$229,936.26. CP 1175-76. This figure did not account for the unrealized investment gains of \$361,298.93, which brought the total income and gains of the Junk Trust to \$591,235.19. *Id.* During the last reporting period, the Junk Trust experienced an approximate overall rate of return of 16.15% net of trustee and investment management fees; the trust had an annualized return since inception of 3.38% net of fees. CP 1175-76.<sup>30</sup> These outstanding results belie the trial court's unjustified fear that the Trust will run out of money.

Simply stated, the income total and gains of \$591,235.19 received by the Junk Trust *far exceed* RBC's trustee and UBS's investment

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<sup>30</sup> Even these data can be somewhat misleading. See CP 1176. For example, a trustee may invest more heavily in bonds to reflect the risk tolerance of the beneficiary or to protect against volatility in the equities market or to obtain a tax advantage. That trustee may appear to "underperform" in an up market as compared to a trustee that invests more heavily in equities. However, that same trustee may "outperform" a trustee with equity-heavy investments in a down market.

Long-term rates of return can help account for some of this variability in investments, but requesting that an outside trustee provide an analysis of how they "would have" invested Trust assets can also be problematic. The outside trustee has the benefit of hindsight and the ability to manipulate hypothetical scenarios retrospectively with knowledge of what actually happened. Equally important, the outside trustee may not have been aware of other conditions that existed in the administration of the trust. For example, the beneficiary may have experienced an unexpected, immediate need for cash to pay large expenditures which, in turn, caused a need to sell investments at an inopportune time. Such a condition can have a significant impact on the overall performance of the trust.

management fees, even when Trust expenditures are factored into the equation. Such significant income and gains confirm UBS's skill in investment of the Trust assets and the propriety of RBC continuing to engage UBS in the role of the Trust's investment manager. The income and gains justify the fees incurred during the reporting period. The trial court ignored this factor.

(e) The Manual and Over-all Services Performed

The fifth and final *Powell* factor is the “manual and over-all services performed” by the trustee. 68 Wn.2d at 41. *Powell* further broke down these over-all services performed by analyzing the trustee’s duties in two distinct categories, namely 1) manual services, and 2) investment responsibility. *Id.* at 42. The manual services represented the number and type of disbursements, and the maintenance of itemized records and receipts, which were forwarded to the attorney for the Trust for the income taxes and preparation of the annual report to the court. *Id.* RBC performed all of the manual duties as outlined in *Powell*. However, RBC had additional significant services to perform as it was not simply making monthly distributions to Christopher. Instead, RBC was making irregular, discretionary distributions to Christopher, Dennis, and his other caregivers. Such services by RBC include the extensive experience and specialized skill and judgment of RBC's employees, in making

distributions and administering the Trust. CP 1177.

RBC also maintained responsibility for the Trust investments. The trustee hired UBS in accordance with paragraph 4.3(c) of the Junk Trust to assist with investment management, but ultimately, all investment responsibility rests with RBC. The investment activities performed by RBC during the reporting period include regular contact with UBS to review investments and discuss upcoming cash requests, monthly review of assets and their allocation to ensure that UBS's investments were prudent, setting investment policies and procedures, annual review of the Junk Trust's Investment Policy Statement to verify that the investments are in line with the stated objective, periodic communications with UBS to discuss the need to buy or sell assets to remain within the appropriate allocation, and coordinating all investment meetings to include Christopher and Dennis Junk on at least an annual basis. CP 1177-78, 1185-87. RBC's extensive manual duties over and above those seen in *Powell*, as well as its significant investment responsibility, warrant its compensation as trustee. The trial court failed to address this factor.

Under the *Powell* factors, RBC's trustee fee here was reasonable.

#### F. CONCLUSION

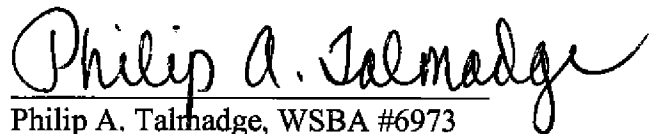
The trial court erred in relying on the Albertson GAL report to reduce RBC's trustee fees both retroactively, contrary to its own order,

and prospectively. Moreover, the trial court's February 6, 2015 order was unsupported. It failed to recognize the directive in paragraphs 4.3(c) and 4.3(f) of the Junk Trust instrument that the trustee be paid in accordance with its fee schedule, already approved by the court, and that the trustee had discretion regarding an investment advisor's retention and compensation. It also failed to assess the ultimate reasonableness of the fees by considering them in light of all the *Powell* factors for determining the reasonableness of a trustee's fee.

This Court should vacate the February 6, 2015 order insofar as it purports to alter the fee charged by RBC and UBS to the Junk Trust as its trustee. Costs on appeal should be awarded to RBC.

DATED this 10th day of August, 2015.

Respectfully submitted,

A handwritten signature in black ink, reading "Philip A. Talmadge". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

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Talmadge/Fitzpatrick/Tribe  
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Third Floor, Suite C  
Seattle, WA 98126  
(206) 574-6661  
Attorneys for Appellant  
RBC Trust Co. (Delaware) Ltd.

# APPENDIX

RCW 11.96A.160:

- (1) The court, upon its own motion or upon request of one or more of the parties, at any stage of a judicial proceeding or at any time in a nonjudicial resolution procedure, may appoint a guardian ad litem to represent the interests of a minor, incapacitated, unborn, or unascertained person, person whose identity or address is unknown, or a designated class of persons who are not ascertained or are not in being. If not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several persons or interests.
- (2) The court-appointed guardian ad litem supersedes the special representative if so provided in the court order.
- (3) The court may appoint the guardian ad litem at an ex parte hearing, or the court may order a hearing as provided in RCW 11.96A.090 with notice as provided in this section and RCW 11.96A.110.
- (4) The guardian ad litem is entitled to reasonable compensation for services. Such compensation is to be paid from the principal of the estate or trust whose beneficiaries are represented.

RCW 11.97.070:

The trustor of a trust may by the provisions of the trust relieve the trustee from any or all of the duties, restrictions, and liabilities which would otherwise be imposed by chapters 11.95, 11.98, 11.100, and 11.104A RCW and RCW 11.106.020, or may alter or deny any or all of the privileges and powers conferred by those provisions; or may add duties, restrictions, liabilities, privileges, or powers to those imposed or granted by those provisions. If any specific provision of those chapters is in conflict with the provisions of a trust, the provisions of the trust control whether or not specific reference is made in the trust of any of those chapters, except as provided in RCW 6.32.250, 11.96A.190, 19.36.020, 11.98.002, 11.98.200 through 11.98.240, 11.98.072(1), 11.95.100 through 11.95.150, and chapter 11.103 RCW. In no event may a

trustee be relieved of the duty to act in good faith and with honest judgment. Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as “absolute,” “sole,” or “uncontrolled,” the trustee must exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

RCW 11.106.060:

Upon or before the return date any beneficiary of the trust may file the beneficiary’s written objections or exceptions to the account filed or to any action of the trustee or trustees set forth in the account. The court shall appoint guardians ad litem as provided in RCW 11.96A.160 and the court may allow representatives to be appointed under RCW 11.96A.120 or 11.96A.250 to represent the persons listed in those sections.

FILED  
DEPT. 10  
IN OPEN COURT

NOV 21 2014

Pierce County Clerk  
By  DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

GUARDIANSHIP OF CHRISTOPHER JUNK,

Cause No: 08-4-00830-7

ORDER APPOINTING GAL

(OR)

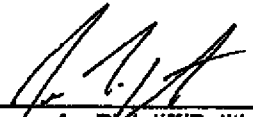
① The Court appoints Dan Adamson to ~~be~~ as Guardian and Litem to review the Reports of Trustee and Petition for Approval filed on October 29, 2014. The GAL ~~will~~ <sup>shall</sup> specifically <sup>review and</sup> address the amount of attorney's fees and costs, the amount of the trustee's fees and costs, and the Trust expenditures, though, the GAL is not limited to these issues.

② The GAL shall file a Report ~~within~~ at least seven (7) days prior to the hearing set in this Order.

③ A hearing on the GAL Report and Report of Trustee is set for January 23, 2015, at 9:00 am.

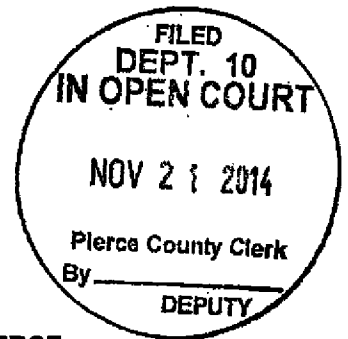
DATED this 21 day of NOV, 2014.

  
JUDGE GAROLD E. JOHNSON

  
Attorney for Plaintiff/Petitioner  
WSBA#

Attorney for Defendant/Respondent  
WSBA#





IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

GUARDIANSHIP OF CHRISTOPHER JUNK,

Cause No: 08-4-00830-7

ORDER APPOINTING GAL (CONTINUED)  
(OR)

- ④ The GAL may review prior Reports of Trustee, with advanced authorization of the Court and notice to the parties.
- ⑤ The GAL shall continue to serve until discharged by the Court.
- ⑥ The GAL may review the pleadings associated with the Report and Petition filed on October 29, 2014, which support the Petition.

DECLARATION OF SERVICE

On said day below, I emailed and deposited with the U.S. Postal Service a true and accurate copy of the Brief of Appellant in Court of Appeals Cause No. 47283-0-II to the following parties:

Dennis Junk  
Debby Junk  
2003 Cascade Drive East  
Roy, WA 98580

Original E-filed with:  
Court of Appeals, Division II  
Attn: David Ponzoha  
950 Broadway, Suite 300  
Tacoma, WA 98402-4427

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: August 10<sup>th</sup>, 2015 at Seattle, Washington.

A handwritten signature in black ink, appearing to read 'Roya Kolahi', written over a horizontal line.

Roya Kolahi, Legal Assistant  
Talmadge/Fitzpatrick/Tribe

# **TALMADGE FITZPATRICK TRIBE**

**August 10, 2015 - 11:24 AM**

## **Transmittal Letter**

Document Uploaded: 4-472830-Appellant's Brief.pdf

Case Name:

Court of Appeals Case Number: 47283-0

**Is this a Personal Restraint Petition?** Yes ☐ No

### **The document being Filed is:**

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

☒ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### **Comments:**

No Comments were entered.

Sender Name: Christine Jones - Email: [roya@tal-fitzlaw.com](mailto:roya@tal-fitzlaw.com)

A copy of this document has been emailed to the following addresses:

[dennis\\_junk@yahoo.com](mailto:dennis_junk@yahoo.com)